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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 4(g) of the	)	
Cable Television Consumer Protection	)	MM Docket No. 93-8
Act of 1992	)	
	)	
Home Shopping Station Issues	)	

To: The Commission

PETITION FOR RECONSIDERATION

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SUMMARY

The Commission's conclusion that broadcast stations which are "predominantly utilized" for the presentation of commercial sales presentations eviscerates whatever was left of the public interest standard of the Communications Act. In making that decision, the Commission has made legal and procedural errors warranting reconsideration of its Report and Order.

First and foremost, by ignoring the issue of excessive commercialization, i.e., whether 55½ minutes of commercial sales presentations per hour, 24 hours per day is excessive, the Commission has arbitrarily and capriciously spurned the express Congressional directive set out in Section 4(g) of the 1992 Cable Act. Section 4(g) requires the FCC to examine stations "predominantly utilized for...sales presentations...," but the FCC confined its review to the only characteristic of these stations' service which they have in common with all other stations, their non-sales programming. In holding that any station which carries 4½ minutes per hour of presumptively community responsive programming serves the public interest, the FCC asked and answered the wrong question.

The Commission similarly buried its head in the sand when it concluded that full-time home shopping affiliation is necessary for the economic survival of small and marginal UHF stations. This begged the more important question of whether these stations could remain economically viable doing less than 24 hour a day commercial sales presentations. Since Section 4(g) gives the Commission broad latitude in defining the term "predominantly utilized," the Commission thus failed to consider whether it could have adopted a definition permitting 12 (or even more) hours daily of home shopping, while still taking action to establish an outer limit on excessive commercialization. The Commission also ignored suggestions for establish-

ing a slow transition period to wean these stations from a predominance of such commercial matter.

In addition, the Commission arbitrarily and capriciously violated its own regulations, the Administrative Procedure Act and principles of fairness when it relied on ex parte submissions which were not made part of the record in this proceeding. In his decisive vote (the Commission split 2-1), Chairman Quello placed decisional reliance on a number of letters which argued that home shopping services performed an important community service. These letters were not made part of the rulemaking record, and the lack of adequate notice of the receipt of their receipt unfairly denied other parties the opportunity to respond.

The Commission also erred when it ignored the June 22, 1993 letter from House Energy and Commerce Committee Chairman John Dingell which supported CSC's argument (rejected by the Commission), that Congress intended the Commission to examine whether the part of the spectrum now being used for home shopping stations could be put to better use by non-broadcast services such as land mobile, public or emergency services.

Finally, the Commission must vacate gratuitous dictum on whether home shopping stations deserve a renewal expectancy. Section 4(g)(2) directed the Commission to make such a determination only if it determined that such stations did not serve the public interest. Moreover, the Commission's finding that such stations do deserve such a renewal expectancy based on an incorrect interpretation of Section 4(g)(2).

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To: The Commission

PETITION FOR RECONSIDERATION

The Center for the Study of Commercialism ("CSC") hereby submits this Petition for Reconsideration of the Commission's Report and Order, 58 FR 39156 (July 22, 1993) ("R&O") issued in the above docket.

INTRODUCTION

The Commission's conclusion that broadcast stations which engage in 24 hour-a-day home shopping programming serve the public interest makes a complete mockery of the public interest standard of the Communications Act. The Commission's stubborn insistence on ignoring the 55½ minutes per hour of commercial matter which typifies these stations, and focusing instead on their 4½ minutes of so called "public interest" programming is an ugly example of the agency side-stepping a legislative directive - in this case, an express directive to examine whether such use of scarce, publicly-owned spectrum is overcommercialization contrary to the public interest.

In his dissent, Commissioner Duggan, succinctly defined the question the Commission must address:

> Do television stations that fill 23 hours a day with satellite delivered, non-stop sales pitches serve the public interest by salting each hour of commercials with four minutes an hour of public service announcements?

Duggan Dissent at 2.

From the inception of broadcast regulation on through the Commission's greatest deregulatory heyday, the answer to this question has always been a resounding *"No."* And, consistent with over 50 years of broadcast regulation and Congressional intent in enacting both the Communications Act of 1934 and Section 4(g) of the 1992 Cable Act, the Commission has no choice but to reach the same conclusion as its predecessors - that excessive commercialization is never in the public interest.

In addition to the Commission's failure to address the issue of overcommercialization, several other errors also require Commission reconsideration of its R&O. First, the Commission arbitrarily and capriciously concluded that full-time home shopping programming was necessary for the viability of small and marginal UHF stations without addressing whether such stations could be viable by carrying such commercial matter on a part-time basis. Second, the Commission violated its own regulations, as well as the Administrative Procedure Act, 5 U.S.C. §§ 551 et seq. when it 1) relied on ex parte submissions that were not thereafter made part of the record in this proceeding, thereby denying opposing parties the opportunity to respond to them and 2) completely ignored the June 22, 1993 letter from John Dingell, Chairman of the House Committee on Energy and Commerce and the interpretation of Section 4(g) contained therein.

I. THE COMMISSION FAILED TO ADDRESS THE ISSUE OF WHETHER PROGRAMMING 55½ MINUTES OF COMMERCIAL MATTER PER HOUR IS IN THE PUBLIC INTEREST.

In finding that home shopping stations serve the public interest, the Commission looked solely to the 4½ minutes per hour of "public interest" programming provided by home shopping stations, and ignored the 55½ minutes of commercial matter per hour that engulfs it.

R&O at ¶¶29-31. In so doing, the Commission arbitrarily and capriciously contravened the express Congressional command to examine the status of stations "predominantly devoted to sales presentations," and thereby avoided the critical issue of whether such sales presentations amount to excessive commercialization which has always been held to be antithetical to the public interest.[1]

CSC has maintained throughout this proceeding the 4½ minutes of non-sales programming broadcast by typical home shopping stations was irrelevant to the question of whether stations predominantly utilized for home shopping serve the public interest. CSC Comments at 18-19; CSC Reply Comments at 5-7. For these purposes, it does not matter how meritorious the non-sales content may be. Rather, CSC has insisted that "what is critical to the public interest determination is the fact that the remaining 55[½] minutes per hour contains nothing more than purely commercial matter." CSC Comments at 18-19. That level of commercialization, CSC argued, is incompatible with the public interest. Id. at 5-9.

The Commission, however, chose to completely ignore the issue of whether 55½ minutes of commercials an hour is contrary to the public interest, and based its determination instead on the 4½ minutes of so-called "public interest" programming provided by typical home shopping stations. R&O at ¶¶29-30.

In concluding that any station which does 4½ minutes per hour of "public interest" programming serves the public interest, the Commission arbitrarily and capriciously ignored

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[1]Chairman Quello has indicated that he wishes to institute "a more general reexamination of the issue of commercialism as it relates to the public interest." Quello Statement at 1. CSC would welcome such action, but this does not cure its failure to decide the more narrow issue presented here. The Commission has an explicit Congressional directive under Section 4(g) to decide in this proceeding whether constant commercial sales presentations serve the public interest.

the dictates of Congress in enacting Section 4(g) of the 1992 Cable Act. That section specifically directs the Commission to

> determine whether broadcast stations that are predominantly utilized for the transmission of sales presentations or program length commercials are serving the public interest, convenience and necessity.

[Emphasis added.]

By that command, Congress clearly directed the Commission to look at one particular type of programming - "sales presentations" (i.e., home shopping) and to determine whether that type of programming, when predominantly utilized by broadcast stations, serves the public interest. The Commission's exclusive focus was placed upon the one characteristic of these stations' service which they have in common with all other stations - their community responsive programming. Had Congress wanted the Commission to examine whether 4½ minutes of non-sales programming per hour served the public interest, it would not have asked the Commission to examine home shopping stations particularly, but all stations.[2]

The legislative history of Section 4(g) supports this view. In his colloquy with House Telecommunications and Finance Subcommittee Chairman Markey, Rep. Eckart emphasized that the station's home shopping programming was the relevant programming to be examined in this proceeding:

> [A]m I correct in the view that the Commission's proceeding should consider the scarcity of broadcasting frequencies in determining whether these program formats are

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[2]The Commission's evasion of its statutory mandate is easily seen if one considers a station which carries exactly the same programming as one of the home shopping stations except that it carries 55½ minutes of feature films, game shows or other non-sales programming. So long as this station's 4½ minutes of community responsive programming met FCC standards, the Commission would, of course, find that this station operated in the public interest. Thus, it is plain that the Commission directed its inquiry to everything but the programming which defines and characterizes the stations it was supposed to examine.

> consistent with the public interest, whether it should take steps to prohibit, limit or discourage such activities, and whether prior agency decisions and policies should be reversed in light of this new statutory mandate.

102 Cong. Rec. E2908 (Remarks of Rep. Eckart) [Emphases added]. Rep. Markey answered in the affirmative.

Had the Commission followed Congress' command by examining whether a predominance of home shopping programming serves the public interest, it would have had no choice but to find that it does not. In the first place, the FCC could not possibly reconcile years of prior decisions with a conclusion that 55½ minutes an hour of commercial matter is not excessive commercialization. See, e.g., Rush Broadcasting Corp., 42 FCC2d 483 (1973); Channel Seventeen Inc., 42 FCC2d 529 (1973). Nor was it ever contemplated that the repeal of quantitative limits on commercialization would result in 55½ minutes per hour of commercials. At all times since the inception of the Communications Act, before and after deregulation, Congress, the Courts and the Commission have consistently reiterated that avoidance of excess commercialization was an essential component of the public interest standard. See, CSC Comments at 5-9. See also, UCC v. FCC, 707 F.2d 1413, 1438 (D.C. Cir. 1983)("In the past this court has expressed its concern about excessive commercialization - a concern mirrored in the Commission's own long-standing policies against domination of scarce broadcast time by private advertiser interests.")

Indeed, even when it was engaging in its most fevered deregulation, the Commission never retreated from the view that overcommercialization was antithetical to the public interest. Rather, the Commission promised that, to the extent that market forces alone proved inade-

quate to control overcommercialization, it would step in to do so.[3] See, TV Deregulation, 98 FCC2d 1076 (1984), Radio Deregulation, 84 FCC2d 968, 1006 (1981). See, CSC Comments at 7-8. By focusing on the 4½ minutes of programming which is not "home shopping" programming, the Commission has improperly avoided the commercialization issue.[4]

II. THE COMMISSION FAILED TO ADDRESS THE ISSUE OF WHETHER THE BENEFITS OF "HOME SHOPPING" STATIONS COULD BE MET BY 12 HOURS PER DAY OR LESS OF COMMERCIAL MATTER.

In deciding that it was necessary to find that home shopping formats serve the public interest to protect the viability of home shopping stations, R&O at ¶35, the Commission arbitrarily and capriciously took an all or nothing view of its obligations under Section 4(g). It thus overlooked consideration of whether it could restrict excessive commercialization and avoid threatening marginal television stations by defining the statutory term "predominantly devoted to sales presentations," so as to allow enough home shopping service to meet revenue needs.

The Commission found that "home shopping affiliation is important to the efforts of a number of small and marginal stations to continue to operate and serve the public interest." R&O at ¶35. In making that determination, it did not differentiate between stations which

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[3]In fact, judicial approval of the repeal of the quantitative commercial guidelines was predicated upon this promise. UCC v. FCC, supra. ("[W]e trust the Commission will be true to its word and will revisit the area in a future rulemaking proceeding.")

[4]To the extent Chairman Quello states that there is a "distinction between the issue of 'commercialism,'...and that of providing a home shopping service," Quello Statement at 3 [Emphasis in original], he ignores that avoidance of home shopping "services" over the airwaves was a principal concern of Congress when it enacted the public interest standard of the Communications Act of 1934. Erik Barnouw, "The Sponsor, Notes on a Modern Potentate," Oxford University Press, 1978 at 25-27.

broadcast such programming 24 hours a day and those that broadcast less. Because it determed that all home shopping stations serve the public interest regardless of the amount of commercial matter they broadcast, the Commission declined to adopt a definition of what constitutes a station "predominantly utilized" for the broadcast of commercial matter. R&O at ¶2 n.4.

Responding to the Commission's request for comment on the definition of "predominantly utilized," CSC and a number of other parties made various recommendations for a workable definition.[5] The premise of these recommendations was that a broadcast station need not program full-time commercial matter to remain economically viable. See, CSC Comments at 13.

But, in its desperate desire to find that all of these stations serve the public interest, the Commission never examined whether smaller or marginal UHF stations could survive without engaging in 24 hour-a-day home shopping programming; it simply treated all home shopping stations generically. Nor did it explore whether those home shopping stations which are neither small nor marginal could be viable with less than a preponderance of home shopping programming. Finally, to the extent that the Commission found that "requiring home shopping stations to substantially modify their format would have a destabilizing impact on the minority

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[5]For example, CSC recommended 50 percent of a station's operating time, as long that time does not include all prime-time periods. To insure a successful transition away from a predominance of home shopping programming, CSC suggested that the Commission could grant waivers or extensions of the transition period in the case of minority-owned stations or other stations carrying programming which meets important needs which otherwise would not be met. CSC Reply Comments at 14. KPST-TV, a Home Shopping Network affiliate, suggested a definition of a home shopping stations as one which devotes more than 50% of its total broadcast hours and more than 25% of its prime time hours to home shopping programming. KPST-TV Comments at 4-6.

ownership of television stations," R&O at ¶32, it arbitrarily and capriciously failed to address CSC's recommendations for slow transitions and waivers for those stations and others which address otherwise unmet community needs. See, CSC Reply Comments at 13-14.[6]

III. THE COMMISSION IMPROPERLY RELIED UPON EX PARTE INFORMATION WHICH WAS NOT MADE PART OF THE RECORD IN THIS PROCEEDING.

The Commission's vote on the R&O was 2-1. There is strong evidence that Chairman Quello's therefore dispositive vote in favor of the item was based on numerous ex parte submissions that were not made part of the record of this proceeding. As such, there was no opportunity for other parties in the proceeding to rebut the factual claims made in these submissions that home shopping services are necessary for the elderly, handicapped and other individuals. By not making those submissions part of the record, the Commission violated its own rules, as well as basic principles of administrative fairness.

Chairman Quello's Separate Statement to the R&O reveals that a determinative factor for the Chairman's deciding vote was the "dozens of individuals and organizations from across the country [who] wrote to urge the Commission to decide this proceeding in favor of home shopping stations." Quello Statement at 3. Among the over 125 letters the Chairman cited, special notice was given to those of the "Director of the Suffolk County Office of Handicapped Services," the "volunteer coordinator of an organization that serves the homebound elderly," the director of an extended care facility for the elderly," and "an official in a home health agency." Id. at 4. Leaving aside the propriety of reliance on a "vote" of letters so obviously

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[6]To the extent that the Commission concluded that home shopping stations serve specialized needs of homebound and other viewers who may be unable to shop in stores, R&O at ¶28, the Commission has similarly failed to explain how 12 or more hours a day of part-time service will not adequately meet their needs.

generated by an organized campaign, no mention of these letters are made in the R&O itself.[7]

These submissions, upon which decisional reliance was placed, have not been included in the record of this proceeding. Rather, the numerous letters cited in the Chairman's statement all appear to be ex parte submissions filed during the period after the Commission removed this matter from its June 24, 1993 meeting agenda, and before it issued the R&O.[8]

The letters upon which Chairman Quello relies have not been identified in FCC notices, nor placed in the record of this proceeding. As such, CSC is unable to respond directly to them. While there is no prohibition against submission of such ex parte statements, the Commission's rules require that they be placed in the record of the proceeding, with adequate notice given to other parties. 47 CFR §1.1206(1)(1992). It is arbitrary and capricious, a violation of the Administrative Procedure Act, and fundamentally unfair, for a Commission action to be predicated upon arguments not in the record and not subject to rebuttal. See, e.g., Home Box Office v. FCC, 567 F.2d 9 (D.C. Cir. 1977).

IV. THE COMMISSION IMPERMISSIBLY IGNORED THE LETTER FROM HOUSE ENERGY AND COMMERCE COMMITTEE CHAIRMAN DINGELL AND THE ISSUES RAISED THEREIN WITH RESPECT TO SPECTRUM ALLOCATION.

In rejecting CSC's argument that the FCC must consider competing demands for other, non-broadcast uses of spectrum presently dedicated to home shopping television service, the Commission arbitrarily and capriciously failed to address the legal arguments raised in the June

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[7]For what it is worth, there is ample evidence of broad public opposition to the Chairman's position from the public at large, newspaper editorialists and members of Congress.

[8]Of the four letters the Chairman discusses in detail, they are dated respectively June 30, June 25, June 25 and June 29. Quello Statement at p. 4, nn. 23-27. Since the Chairman refers to these letters as being filed all "in the space of a few days," Quello Statement at 3, it appears that the other letters were submitted at approximately the same time.

22, 1993 letter from House Energy and Commerce Committee Chairman John Dingell to Chairman Quello ("Dingell Letter").[9] This letter is valid and important post-enactment legislative history which cannot simply be dismissed without mention.

The Dingell Letter clarified the meaning of several provisions of Section 4(g) the 1992 Cable Act, including, inter alia, the requirement that the Commission consider "the level of competing demands for the spectrum allocated to such stations..." when determining whether stations predominantly devoted to commercial matter serve the public interest. Chairman Dingell explained:

> Among the factors that the Commission is required to consider is the level of competing demands for the spectrum allocated to such stations [emphasis added]. Congress is well aware of the distinction between "allocating" frequencies and making frequency assignments. Congress is equally aware of the needs of a variety of public safety agencies, including police and fire departments, and other emergency services, for additional spectrum to meet the needs of their communities. The term "allocated" was included in the statute in order to force the Commission to revisit its earlier policies, and determine that allowing television licensees to broadcast these sales presentations constitutes the "highest and best use" of these scarce spectrum resources.

Dingell Letter at 2.

Spurning CSC's position on the interpretation of Section 4(g), see CSC Comments at 16, CSC Reply Comments at 20-21,[10] the Commission found that "Congress [did not] intend[]

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[9]It is especially egregious for the Commission to ignore the Dingell Letter in light of the decisional reliance placed upon the ex parte submissions discussed above, which were not made part of the record in contravention of the Commission's regulations. See, 47 CFR §1.1206(1)(1992). While the Dingell Letter was not made part of the record, that is because ex parte submissions from members of Congress need not be submitted for inclusion in the public record when Congress and the Commission jointly have jurisdiction over a matter. 47 CFR §1.1204(b)(5)(1992).

[10]CSC asserted that the plain language and legislative history of Section 4(g) demonstrated that "Congress intended that the Commission weigh whether that part of the spectrum which is set aside exclusively for broadcasters only...and which is being used predominantly for the broadcast of commercial matter, would be put to better use by another user. The Commission

for us to consider the demands of other nonbroadcast services in this proceeding." R&O at ¶8. Having so concluded, the Commission limited itself to consideration of competing demands for the broadcast spectrum only.[11]

Thus, in not considering the Dingell Letter, the Commission arbitrarily and capriciously overlooked an argument which buttressed CSC's interpretation of Section 4(g) and directly contradicted its conclusion that "Congress [did not] intend[] for us to consider the demands of other nonbroadcast services in this proceeding." This added support might well have persuaded the Commission that CSC's argument was correct. Moreover, the Dingell Letter constitutes valid post-enactment legislative interpretation, which does not carry as much weight as pre-enactment legislative history, but cannot simply be ignored, as the Commission has done here.

Thus, the Commission must now reconsider the interpretation of Section 4(g) in light of the Dingell Letter and determine whether there are "higher uses" for the spectrum which is now being used by stations predominantly devoted to commercial matter.

V. THE COMMISSION MUST VACATE DICTUM IN THE R&O WITH RESPECT TO THE RENEWAL EXPECTANCY ACCORDED STATIONS PREDOMINANTLY DEVOTED TO HOME SHOPPING.

The Commission's finding that a renewal expectancy should not be denied to stations engaged in a predominance of home shopping programming is gratuitous dictum that is flatly

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is to consider under Section 4(g) then, whether the public interest is better served by the use of such spectrum by police, fire or other emergency services, or by other commerce producing broadcast services such as land mobile communications." CSC Reply Comments at 20-21.

[11]The FCC then found that "the existing renewal system as well as the initial licensing process adequately takes into account the competing demands of television broadcasters for the television broadcaster spectrum. Moreover, we find the lack of competing applications against the renewal of home shopping stations to be a compelling indication that the level of competing demands for the spectrum utilized by home shopping stations is minimal." R&O at ¶12.

incompatible with the plain language and legislative history of Section 4(g)(2). It therefore should be vacated.

Having already concluded that stations predominantly devoted to home shopping serve the public interest, the Commission nonetheless addressed CSC's argument that in any event, a renewal expectancy should not be given to such stations. The Commission then rejected the CSC's argument on the basis that "Section 4(g)(2) of the 1992 Cable Act directs the Commission not to use home shopping stations' format as a basis to deny them a renewal expectancy, even if their commercial programming is found not to serve the public interest." R&O at ¶36.

The plain language of the law contradicts the Commission's interpretation:

> In the event that the Commission concludes that one or more of such stations are not serving the public interest, convenience and necessity, the Commission shall allow the licensees of such stations a reasonable period to provide different programming, and shall not deny such stations a renewal expectancy solely because their programming consisted predominantly of sales presentations or program length commercials.

[Emphases added].

Thus, under Section 4(g)(2), once the Commission determined that home shopping stations serve the public interest, it had no reason to reach the issue of renewal expectancy. Therefore, its discussion on the matter is dictum.

Moreover, the Commission's interpretation of the statute as requiring the Commission to ignore entirely these stations' formats in considering whether they warrant a renewal expectancy is flatly inconsistent with the statute's dictate that such determination not be made "solely" with regard to that format. And the legislative history, while reiterating that the home shopping format should not be the only basis for denial of renewal expectancy, emphasizes that it should be considered "a major factor in determining to award or deny a renewal expectancy." 102 Cong. Rec. E2908 (October 2, 1992) (Remarks of Rep. Eckart). See, CSC Com-

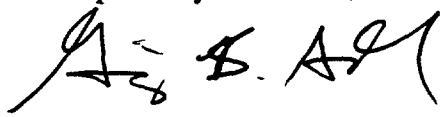
ments at 20-21.

CONCLUSION

Commissioner Duggan, in his dissent in this matter, analogized the state of the public interest standard after the Commission's decision here as "a sort of once-handsome thoroughbred, so abused and neglected that it has finally broken down in the middle of the track. Perhaps we can take it back to the paddock in the hope that, with care and love, it can recover...."

The several legal and procedural errors the Commission has committed in the R&O require that the horse be returned to the paddock. It is now the Commission's responsibility to nurse the sick patient back to its once proud state.

Respectfully submitted,



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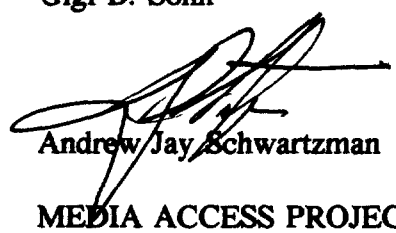

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